

No. **77-593**

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In the Supreme Court of the United States

OCTOBER TERM, 1977

UNITED STATES OF AMERICA

v.

LEROY SORRELL

UNITED STATES OF AMERICA

v.

LOUIS THOMPSON

**PETITION FOR WRITS OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

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The Solicitor General, on behalf of the United States, petitions for writs of certiorari to review the judgments of the United States Court of Appeals for the Third Circuit in these cases.

OPINIONS BELOW

The opinions of the court of appeals in both cases (Apps. A and B, *infra*) are not yet reported.¹ The

¹ The cases were argued and decided together by the court of appeals sitting *en banc*.

opinion of the district court in *Sorrell* (App. E, *infra*) is reported at 413 F.Supp. 138. The opinion of the district court in *Thompson* (App. F, *infra*) is unreported.

JURISDICTION

The *en banc* judgments of the court of appeals (Apps. C and D, *infra*) were entered in both cases on August 22, 1977. On September 13, 1977, Mr. Justice Brennan extended the time for filing petitions for writs of certiorari to and including October 21, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a writ of *habeas corpus ad prosequendum* issued by a federal court to state authorities, directing the production of a state prisoner for trial on federal criminal charges, constitutes a detainer or a written request for temporary custody making applicable the terms and conditions of the Interstate Agreement on Detainers Act.

2. Whether a state prisoner who was produced by state authorities pursuant to a writ of *habeas corpus ad prosequendum* to answer federal charges and temporarily held by federal authorities without incarceration in any other facility is entitled to dismissal of the federal charges because he was returned to state prison on that same day without trial.

STATUTES INVOLVED

1. Section 2 of the Interstate Agreement on Detainers Act, 84 Stat. 1397-1402, 18 U.S.C. App., pp. 4475-4477, provides in pertinent part:

Article II

As used in this agreement:

(a) "State" shall mean a State of the United States; the United States of America * * *

* * * * *

Article III

(a) Whenever a person has entered upon a term of imprisonment in a penal or correctional institution of a party State, and whenever during the continuance of the term of imprisonment there is pending in any other party State any untried indictment, information, or complaint on the basis of which a detainer has been lodged against the prisoner, he shall be brought to trial within one hundred and eighty days after he shall have caused to be delivered to the prosecuting officer and the appropriate court of the prosecuting officer's jurisdiction written notice of the place of his imprisonment and his request for a final disposition to be made of the indictment, information, or complaint * * *.

* * * * *

(c) The warden, commissioner of corrections, or other official having custody of the prisoner shall promptly inform him of the source and con-

tents of any detainer lodged against him and shall also inform him of his right to make a request for final disposition of the indictment, information, or complaint on which the detainer is based.

* * * *

Article IV

(a) The appropriate officer of the jurisdiction in which an untried indictment, information, or complaint is pending shall be entitled to have a prisoner against whom he has lodged a detainer and who is serving a term of imprisonment in any party State made available in accordance with article V(a) hereof upon presentation of a written request for temporary custody or availability to the appropriate authorities of the State in which the prisoner is incarcerated: * * * *And provided further*, That there shall be a period of thirty days after receipt by the appropriate authorities before the request be honored, within which period the Governor of the sending State may disapprove the request for temporary custody or availability, either upon his own motion or upon motion of the prisoner.

* * * *

(e) If trial is not had on any indictment, information, or complaint contemplated hereby prior to the prisoner's being returned to the original place of imprisonment pursuant to article V(e) hereof, such indictment, information, or complaint shall not be of any further force or effect, and the court shall enter an order dismissing the same with prejudice.

Article V

(a) In response to a request made under article III or article IV hereof, the appropriate authority in a sending State shall offer to deliver temporary custody of such prisoner to the appropriate authority in the State where such indictment, information, or complaint is pending against such person in order that speedy and efficient prosecution may be had. * * *

* * * *

2. 28 U.S.C. 2241 provides in pertinent part:

(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. * * *

* * * *

(c) The writ of habeas corpus shall not extend to a prisoner unless—

* * * *

(5) It is necessary to bring him into court to testify or for trial.

* * * *

STATEMENT

A. Sorrell

In March 1976, respondent Sorrell was charged in an indictment filed in the United States District Court for the Eastern District of Pennsylvania with unlawful possession of a firearm, in violation of 26 U.S.C. 5861(d) and (i). At the time that the indictment was returned, respondent was incarcerated at the State Correctional Institution at Graterford, Pennsyl-

vania, serving a sentence on state criminal charges (App. A, *infra*, p. 2a).²

On March 23, 1976, the United States District Court for the Eastern District of Pennsylvania issued a writ of *habeas corpus ad prosequendum*, requiring that respondent be produced for arraignment before the district court on April 2, 1976. Three days later, on March 26, 1976, a federal detainer was lodged against respondent at the Graterford Prison. On April 2, 1976, pursuant to the writ of *habeas corpus ad prosequendum*, respondent was produced at the district court for arraignment, entered a plea of not guilty, and was returned to the Graterford facility on the same day (*id.* at 3a-5a). On April 19, 1976, respondent was again produced before the district court by means of a writ of *habeas corpus ad prosequendum*, this time for trial; however, he was returned to the Graterford Prison after the trial was continued at the request of defense counsel (*id.* at 5a).

Respondent was brought before the district court a third time pursuant to a writ of *habeas corpus ad prosequendum* on April 26, 1976, when the case was scheduled for trial. At this point, respondent moved

² There are no federal detention facilities in the Eastern District of Pennsylvania. Accordingly, federal prisoners awaiting trial at the United States Court House in Philadelphia are incarcerated in nearby state facilities pursuant to a contract between federal and state authorities (see 18 U.S.C. 4002). The Graterford Prison, where Sorrell was incarcerated, is located 35 miles from Philadelphia and was apparently not normally used to house federal prisoners (App. A, *infra*, pp. 3a-5a n.3).

for dismissal of his indictment on the ground that he had been returned to state custody without having first been tried on the federal charges, in violation of Article IV(e) of the Interstate Agreement on Detainers Act ("Agreement").³ Article IV of the Agreement provides that the prosecuting authority of a member state in which criminal charges are pending against a defendant serving a prison sentence in another member jurisdiction may lodge a detainer with the prison authority of that jurisdiction and, upon written request, obtain temporary custody of the prisoner for purposes of trial. The Agreement further provides that the prisoner must be tried (a) within 120 days of his arrival in the receiving state and (b) prior to being returned to the sending state, or the charges against him shall be dismissed with prejudice. Article IV(c) and (e).⁴

³ The United States joined the Agreement by Act of December 9, 1970, Pub.L. 91-538, Sections 1-8, 84 Stat. 1397-1403, 18 U.S.C. App., pp. 4475-4478. At all times relevant hereto, Pennsylvania was also a party to the Agreement. 19 Pa. Stat. Ann. §§ 1431-1438 (Purdon's 1964).

⁴ Article III of the Agreement provides an alternative means by which transfer of the prisoner may be accomplished. Under Article III(c), prison officials are required to notify each prisoner of any criminal charge on the basis of which a detainer has been lodged against him by another jurisdiction and, further, to inform the prisoner of his right to request trial on the charges underlying the detainer. The prisoner may then act to clear such a detainer by filing a request with the appropriate authorities in the prosecuting jurisdiction for final disposition of the charge against him. He must thereupon be brought to trial (a) within 180 days of delivery of this request and (b) without being returned to the sending

The district court granted respondent's motion to dismiss the indictment (App. E, *infra*, pp. 54a-61a). It rejected the government's argument that because respondent had been produced before the district court pursuant to writs of *habeas corpus ad prosequendum*, the provisions of the Agreement were inapplicable and provided no basis for dismissing the indictment. The court held that the "Agreement is the exclusive method for transfer of a state prisoner to another state (including, under the Agreement, the United States) for any phase of prosecution in the transferee state" (*id.* at 57a; footnote omitted).

B. Thompson

On January 15, 1976, respondent Thompson was charged in an indictment filed in the United States District Court for the Eastern District of Pennsylvania with two counts of distribution of heroin, in violation of 21 U.S.C. 841(a)(1). At the time that the indictment was returned, respondent was serving a sentence on state criminal charges at the Holmesburg Prison, Philadelphia, Pennsylvania (App. B, *infra*, p. 15a).⁵

On March 25, 1976, a federal detainer was lodged against respondent at the Holmesburg Facility (App.

state after having been brought there, or else the charges are subject to dismissal with prejudice. Articles III(a), III(d) and V(c).

⁵ Pursuant to a contract between federal and state authorities, Holmesburg Prison in Philadelphia is regularly used by the United States for pre-trial detention of persons accused of federal crimes (App. B, *infra*, p. 15a).

B, *infra*, p. 15a n.1). On April 6, 1976, the United States District Court for the Eastern District of Pennsylvania issued a writ of *habeas corpus ad prosequendum*, requiring that respondent be produced for arraignment on April 9, 1976. On that date, pursuant to the writ, respondent was brought before the district court, entered a plea of not guilty, and was returned to Holmesburg Prison (App. B, *infra*, p. 15a).

On May 3, 1976, respondent was produced before the district court for trial by means of a writ of *habeas corpus ad prosequendum*. Prior to this appearance, respondent had moved for dismissal of his indictment on the ground that he had been returned to state custody without having first been tried on the federal charges, in violation of the Interstate Agreement on Detainers Act. The district court denied the motion (App. F, *infra*, pp. 62a-67a), stating that the "Interstate Agreement on Detainers Act is not applicable in a case in which the federal government is trying a prisoner serving a state sentence within the geographical limits of the state in which the federal court is sitting" (*id.* at 66a-67a). Following a jury trial, respondent was convicted of the charges in the indictment and, on July 9, 1976, was sentenced to two years' imprisonment to be followed by a special parole term of three years.

C. The Opinions of the Court of Appeals

A divided court of appeals, sitting *en banc*, affirmed the opinion and order of the district court in *Sorrell* and reversed the judgment of the district court in

*Thompson*⁶ (Apps. A and B, *infra*). Relying on its decision in *United States ex rel. Esola v. Groomes*, 520 F.2d 830 (C.A. 3), and that of the Second Circuit in *United States v. Mauro*, 544 F.2d 588 (C.A. 2), certiorari granted, October 3, 1977, No. 76-1596, the majority concluded that the writ of *habeas corpus ad prosequendum* is the equivalent of a detainer and that its use by federal officials in this case triggered the operation of the Agreement (App. A, *infra*, pp. 7a-10a; App. B, *infra*, p. 16a). Because detainers had been filed against respondents prior to execution of the writs of *habeas corpus ad prosequendum*, the court also indicated that the writs could be considered as "written request[s] for temporary custody or availability" under Article IV (a) of the Agreement (App. A, *infra*, pp. 7a-8a n. 6).

In dissent, Judge Weis took the position that, despite the filing of detainers, the production of respondents in federal court by means of a writ *ad prosequendum* did not engage the provisions of the Agreement (App. B, *infra*, pp. 18a-27a).⁷ He found

⁶ In *Thompson*, the majority rejected the holding of the district court that the Agreement is not applicable when the federal government is trying a state prisoner serving his state sentence within the geographical limits of the state in which the district court is located (App. B, *infra*, p. 16a n.2).

⁷ Judge Weis stated that had no detainer been filed, he would agree with the conclusion reached by the court of appeals for the First Circuit in *United States v. Kenaan*, 557 F.2d 912, petition for a writ of certiorari pending, No. 77-206; the Fifth Circuit in *United States v. Scallion*, 548 F.2d 1168, petition for a writ of certiorari pending, No. 76-6559; the Sixth Circuit in

nothing in either the Agreement or its legislative history to support the conclusion that Congress intended the Agreement to be the exclusive means of transferring a state prisoner to federal custody for trial on federal charges.⁸ In this regard, he observed that the writ of *habeas corpus ad prosequendum* was first authorized by the Judiciary Act of 1789 and found it anomalous that an "ambiguous and superficially considered Agreement" could be read to constrict the "power which has been exercised by the federal courts for almost two hundred years" (*id.* at 21a-22a).⁹

Judge Garth filed a separate dissenting opinion, in which he observed that the Agreement "was designed to govern state-to-state transfers [of prisoners] and

Ridgeway v. United States, 558 F.2d 357, petition for a writ of certiorari pending, No. 77-5252; and the dissenting opinion of Judge Mansfield in *United States v. Mauro*, *supra*, that a federal writ of *habeas corpus ad prosequendum* does not come within the meaning of the word "detainer" as used in the Agreement (App. B, *infra*, at pp. 25a-26a n.5).

⁸ Judge Weis also noted (App. B, *infra*, p. 24a) that the majority's holding created a direct conflict with the Speedy Trial Act, 18 U.S.C. (Supp. V) 3161. Under that Act, a prisoner must be arraigned within 10 days of indictment (18 U.S.C. (Supp. V) 3161(c)), but if his presence at the proceeding can only be obtained by means of the Agreement, a 30-day period may be required before he may be transported to the court (Article IV (a) of the Agreement).

⁹ Judges Adams and Rosenn joined in the conclusion reached by Judge Weis because of their disbelief that Congress intended in the Agreement to "cut back on an enactment as venerable as that of the Judiciary Act of 1789 in the absence of an express statement that Congress intended to do so" (App. B, *infra*, p. 27a).

* * * it is impossible to apply the literal language of that Agreement to the federal government" (*id.* at 44a).

REASONS FOR GRANTING THE WRIT

1. The first question presented in this case—whether the Interstate Agreement on Detainers applies to a transfer of a state prisoner to federal authorities pursuant to a writ of *habeas corpus ad prosequendum*—is closely related to the questions presented in *United States v. Mauro*, *supra*, and *United States v. Ford*, 550 F.2d 732 (C.A. 2), certiorari granted, October 3, 1977, No. 77-52. In *Mauro*, the court of appeals for the Second Circuit held that a federal writ of *habeas corpus ad prosequendum*, directing that a state prisoner be delivered to federal authorities, itself constituted a "detainer" within the meaning of Article IV of the Agreement.¹⁰ In *Ford*, the Second Circuit held that Article IV of the Agreement governs the transfer of a state prisoner by a federal writ of *habeas corpus ad prosequendum* after a "detainer" has been filed against him with state prison authorities.

¹⁰ Other circuits have held, contrary to the Second Circuit and the majority below, that a federal writ *ad prosequendum* is not a detainer and constitutes an alternative method, separate and apart from the Agreement, for securing the presence of state prisoners for trial on federal charges. See *United States v. Kenaan*, *supra*; *Ridgeway v. United States*, *supra*; *United States v. Scallion*, *supra*.

For the reasons articulated in our petitions in *Mauro* and *Ford*,¹¹ we believe that Article IV(e) of the Interstate Agreement on Detainers is inapplicable to transfers of state prisoners by writs of *habeas corpus ad prosequendum*, whether or not a detainer has previously been lodged against the prisoner. Should this Court reverse the decisions of the court of appeals in *Mauro* and *Ford*, it should also reverse the decisions of the court of appeals in these cases. We recommend, therefore, that this Court hold the present petition pending its disposition of the related cases.

2. Even if this Court were to affirm the decisions in *Mauro* and *Ford*, however, affirmance in this case would not necessarily follow. The Second Circuit in *United States v. Chico*, 558 F.2d 1047, held that "Article IV(e) of the Act does not apply to a case where a prisoner is removed from the prison of a state for a few hours to be arraigned, plead and be sentenced in the federal court without ever being held at any place of imprisonment other than that of the sending state and without interruption of his rehabilitation there" (*id.* at 1049; footnote omitted). The court noted that neither the defendants' "continuous physical presence [n]or their rehabilitative programs at the sending state's penal institutions [were] interrupted by any other imprisonment," and it concluded that "[f]or purposes of the Act, the situation is the same as if they had remained continuously in

¹¹ We are sending respondents copies of our petitions in *Mauro* and *Ford*.

state prisons. Cf. *United States v. Sorrell*, 413 F. Supp. 138 (E.D. Pa. 1976); *United States v. Kenaan*, 422 F. Supp. 226 (D. Mass. 1976)" (558 F.2d at 1049).

The same reasoning should apply here. Sorrell was incarcerated at Graterford Prison, located less than 35 miles from the United States Courthouse in Philadelphia. The interruption of his rehabilitation program consisted solely of travel time between Graterford and Philadelphia and a brief appearance in court for arraignment; he was returned to Graterford that same day (App. A, *infra*, pp. 3a-4a). Thompson was produced and returned the same day to Holmesburg Prison (which is located less than 10 miles from the district court), where there is no rehabilitative program to interrupt (App. B, *infra*, p. 25a), and where federal prisoners awaiting trial are routinely housed pursuant to a contract between the United States and the State of Pennsylvania. Indeed, as Judge Weis noted in his dissent, had the United States arranged for the technical "paper" transfer of respondent from state to federal custody, even though it left him within the very same institution, the indictment would not have been dismissed (*ibid.*). It makes little sense to construe the Interstate Agreement on Detainers to achieve such awkward, even absurd, results.

CONCLUSION

The petition for writs of certiorari should be disposed of as appropriate in light of this Court's disposition of *United States v. Mauro*, *supra*, and *United States v. Ford*, *supra*.

Respectfully submitted.

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OCTOBER 1977.

1a

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 76-1647

UNITED STATES OF AMERICA, APPELLANT

v.

LEROY SORRELL

(D. C. Crim. No. 76-165)

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Argued November 18, 1976
Before VAN DUSEN and ALDISERT, *Circuit Judges*,
and BROTMAN, *District Judge*

Reargued en banc May 12, 1977
Before SEITZ, *Chief Judge*, and VAN DUSEN,
ALDISERT, ADAMS, GIBBONS, ROSENN, HUNTER,
WEIS and GARTH, *Circuit Judges*

OPINION OF THE COURT

(Filed August 22, 1977)

VAN DUSEN, *Circuit Judge*.

This is an appeal by the United States from an order of the district court which dismissed an indictment against the defendant because of the Government's failure to comply with the Interstate Agreement on Detainers, 18 U.S.C. App. p. 230 (1977 Supp.) (the Detainer Agreement). We affirm for the reasons stated below.

I.

On March 23, 1976, an Eastern District of Pennsylvania grand jury returned an indictment against Leroy Sorrell for unlawful possession of a firearm.¹ Sorrell was, at the time of his indictment, in the custody of the Commonwealth of Pennsylvania at the State Correctional Institution at Graterford, Pennsylvania, serving a state prison sentence of one to ten years. On March 23, 1976, the district court issued a writ of habeas corpus ad prosequendum,² directing

¹ Sorrell was indicted for violations of 26 U.S.C. § 5861(d), (i), for possession of an unregistered 12-gauge shotgun, having no serial number and a barrel length of 12 inches. The offenses alleged occurred on or about December 29, 1974. Sorrell was indicted for these offenses by the state, but the indictment was subsequently dismissed for failure to comply with Pa. R. Crim. P. 1100 (180-day trial rule). Although not entirely clear from the record, it appears that the federal indictment was returned subsequent to the dismissal of the state prosecution because of the state speedy trial problem.

² Sorrell's appearances before the United States District Court on April 2, April 19 and April 26, 1976, were com-

the United States Marshal and the Warden of Graterford Prison to produce the defendant at the United States Court House, Philadelphia, on April 2, 1976, for arraignment. On April 2, 1976, the defendant was arraigned at the above United States Court House and then returned to Graterford³ by the United States

pelled pursuant to 28 U.S.C. § 2241(a) and (c)(5), which provide in pertinent part:

"§ 2241. Power to grant writ

(a) Writs of habeas corpus may be granted by . . . the district courts . . . within their respective jurisdictions. . . .

"(c) The writ of habeas corpus shall not extend to a prisoner unless—

"(5) It is necessary to bring him into court to testify or for trial."

The service of an order under the above section of Title 28 is fully executed when the custody of the prisoner is changed from the state to the United States. The provision for a writ of habeas corpus ad prosequendum has existed in the Acts of Congress ever since the Judiciary Act of 1791, so that Congress, when it adopted the Detainer Agreement, was well aware of this provision as a means for producing a prisoner from the state jurisdiction to the federal courts to respond to federal criminal charges.

The wording in each of the writs was substantially the same with the only differences appearing in the dates, the description of the proceeding (arraignment or trial), and the judicial officer before whom the defendant was ordered to appear. The form writ for the April 2 appearance is reproduced in note 6 below.

³ Because no federal detention facility exists in the Eastern District of Pennsylvania, federal prisoners awaiting trial at the Philadelphia U. S. Court House are housed in these state

facilities in the nearby area, pursuant to a contract between federal and state authorities (see 18 U.S.C. § 4002; *e.g.*, appendix at A-31 - A-35 in *United States v. Thompson* (3d Cir., No. 76-1976), also decided this day):

Philadelphia Detention Center (Philadelphia)

Berks County Prison at Reading (80 miles from the Philadelphia U.S. Court House)

Delaware County Prison (25 miles from the Philadelphia U.S. Court House)

Chester County Prison (35 miles from the Philadelphia U.S. Court House)

Holmesburg Prison (Philadelphia)

House of Correction (Philadelphia)

The Graterford Prison is 35 miles from the Philadelphia U.S. Court House and there is not regularly available transportation to and from the Philadelphia U.S. Court House to that institution, whereas there is such transportation from the above-listed prisons where federal prisoners are normally kept.

Thus, if Sorrell had been under federal custody in the Philadelphia Detention Center or any of the other prisons listed above, he would have been more available to his counsel because he could have been brought in by a Marshal's car bringing other federal prisoners to the Philadelphia U.S. Court House. By being kept in state custody at Graterford, his counsel had to consult with him at a location where public transportation is not as readily available as it is to the other prisons listed above. This last point was raised by counsel at oral argument before the three-judge panel as well as the en banc court, with the suggestion that the difficulty engendered in gaining access to the defendant because of the above-described complications significantly impaired the ability of counsel to consult with the defendant in preparation for trial and the development of the defense.

At the en banc argument, in response to a question from the panel, it was stated that since the time of the decision of the three-judge panel in this case, affirming the dismissal of the district court, the United States Attorney's Office

Marshal. A second time, on April 19, 1976, Sorrell was brought before the district court for trial pursuant to a writ of habeas corpus ad prosequendum and was returned to Graterford by the United States Marshal after the trial had been continued on the request of defense counsel. Finally, the defendant was removed from state to federal custody for a third time on April 26, 1976, pursuant to such a writ when the case was again scheduled for trial. On this last date, Sorrell filed a motion to dismiss the indictment pursuant to Article IV(e) of the Interstate Agreement on Detainers, 18 U.S.C. App. p. 232 (1977 Supp.); 19 P. S. § 1431 *et seq.*⁴ After oral argument on the motion, the district court filed an opinion⁵ and order granting the defendant's motion and dismissing the criminal indictment. The United States appealed from

for the Eastern District of Pennsylvania has been adhering to the mandates of the Detainer Agreement by retaining federal custody over prisoners until they can be tried. No suggestion has been made to this court that these procedures have impaired the efficient administration of the United States Attorney's responsibilities in any way.

⁴ Article IV(e) of the Detainer Agreement, 18 U.S.C. App. p. 232 (1977 Supp.), provides:

"If trial is not had on any indictment, information or complaint contemplated hereby prior to the prisoner's being returned to the original place of imprisonment pursuant to Article V(e) hereof, such indictment, information or complaint shall not be of any further force or effect, and the court shall enter an order dismissing the same with prejudice."

⁵ *United States v. Sorrell*, 413 F. Supp. 138 (E.D. Pa. 1976).

that final judgment. By a November 4, 1976, judgment order, this court affirmed.

After the filing of a petition for rehearing en banc on January 11, 1977, the judgment order was vacated by an order filed January 27, 1977, and rehearing en banc was scheduled.

II.

The basic statutory framework of the Detainer Agreement has been summarized in *United States ex rel. Esola v. Groomes*, 520 F. 2d 830, 833-34 (3d Cir. 1975), and need not be described here. See also *United States v. Ford*, 550 F. 2d 732, 737-41 (2d Cir. 1977). However, the legislative purpose in adopting this statute is specifically set forth in Article I, which is designed "[t]o implement the right to a speedy trial and to minimize the interference with a prisoner's treatment and rehabilitation," *Esola, supra* at 833, as follows:

"The party States find that charges outstanding against a prisoner, detainers based on untried indictments, informations or complaints, and difficulties in securing speedy trial of persons already incarcerated in other jurisdictions, produce uncertainties which obstruct programs of prisoner treatment and rehabilitation. Accordingly it is the policy of the party States and the purpose of this agreement to encourage the expeditious and orderly disposition of such charges and determination of the proper status of any and all detainers based on untried indictments, informations or complaints. The party States also find

that proceedings with reference to such charges and detainers, while emanating from another jurisdiction, cannot properly be had in the absence of cooperative procedures. It is the further purpose of this agreement to provide such cooperative procedures."

18 U.S.C. App. p. 230 (1977 Supp.).

III.

An issue in this case is whether a writ of habeas corpus ad prosequendum under 28 U.S.C. § 2241(c) (5) is a "detainer" within the meaning of that term as used in the Detainer Agreement. The legislative history of P.L. 91-538 (Act of December 9, 1970, 84 Stat. 1397), adopting the Detainer Agreement, makes clear that Congress intended the word "detainer" to mean any notification filed with the institution in which a prisoner is serving a sentence, advising that he is wanted to face pending criminal charges in another jurisdiction. Each Form Order constituting the writ of habeas corpus ad prosequendum was clearly a notification that the defendant was wanted to face a criminal charge in the United States District Court for the Eastern District of Pennsylvania.*

* The first such order, which was filed March 24, 1976 (Doc. 3 in *United States v. Sorrell*, Crim. No. 76-165, E.D. Pa.), contained this language:

"AND NOW, this 23d day of March, 1976, is it hereby ORDERED, ADJUDGED AND DECREED that the Warden of Graterford Prison and the United States Marshal(s) for the Eastern District of Pa. produce be-

In *Esola, supra*, this court said at pages 836 and 838:

"First, the appellee contends that the five transfers in this case were pursuant to writ of habeas corpus ad prosequendum issued by a state court and honored as a matter of comity, by the Federal Bureau of Prisons. Since the request was not made pursuant to Article IV of the Agreement, it is argued that the remedial provisions could not be relevant. . . .

* * * * *

"The word 'detainer,' as it is used in the Agreement, is 'a notification filed with the institution in which a prisoner is serving a sentence, advising that he is wanted to face pending criminal charges in another jurisdiction.' See Senate Re-

fore this Court the body of Leroy Sorrell on Friday, April 2, 1976, at 10:00 A.M. before the Honorable Peter B. Scuderi in Courtroom No. 3, 4th Floor to appear for Arraignment in the above-captioned matter, and that immediately upon the termination of the said proceedings, the said defendant be delivered into the custody of the said superintendent of the said institution."

Insofar as *United States v. Scallion*, 548 F.2d 1168, 1173 (5th Cir. 1977), holds that "'detainer' for purposes of the Act does not include a writ of habeas corpus ad prosequendum issued by a federal district court," we decline to follow it on the facts of this case.

The lodging on March 26, 1976, of a written document denominated a "Detainer" with the Warden at Graterford (A6-A7), after the issuance of the above writ of habeas corpus ad prosequendum had been signed on March 23 and filed on March 24, did not alter the effect of the March 23 writ as both a detainer and "a written request for temporary custody or availability" under Article IV(a) of the Detainer Agreement. 18 U.S.C. App. p. 232 (1977 Supp.).

port 91-1356, 91st Cong., 2d Sess., 2 U.S. Code Cong. & Admin. News, p. 4865. This definition of a detainer from the Senate Report finds support in the other legislative history of the Agreement and is consistent with the purposes of the Agreement.

"Although the legislative history of the federal enactment of the Agreement is not voluminous, perhaps because there was apparently no opposition to it in either the House of Representatives or Senate, the remarks of Representative Kastenmeier upon introduction of the bill make clear that he considered a detainer to be simply a notice filed with the confining institution that criminal charges from another jurisdiction were outstanding and that the prisoner was wanted in order to stand trial on those charges. 116 Cong. Rec. 13999 (remarks of Rep. Kastenmeier).³⁴ The Committee Reports of both the House Judiciary Committee and the Senate Judiciary Committee follow Rep. Kastenmeier's language almost verbatim."

³⁴ Rep. Kastenmeier stated: 'For the purpose of this legislation . . . a detainer is a notification filed with the institution in which a prisoner is serving a sentence, advising that he is wanted to stand trial on pending criminal charges in another jurisdiction.' 116 Cong. Rec. 13999 (May 4, 1970)."

Our holding that the first two writs of habeas corpus ad prosequendum (see pages 3-4 above) were "detainers" under the Detainer Agreement is supported by *United States v. Mauro*, 544 F.2d 588 (2d Cir. 1976); see also *United States v. Ford, supra* at 736-37; but cf. *Ridgeway v. United States*, — F.2d

— (No. 76-2145, 6th Cir., July 13, 1977); *United States v. Chico*, Opinion of June 20, 1977, — F.2d — 2d Cir. No. 939, Sept. Term 1976, Docket No. 77-1016).^{6a} *Scallion*, *supra*, may be distinguished factually, while *Mauro* is substantially identic[al] to this case and the result there parallels the result we reach here.

The dissenting opinion of Judges Adams, Rosenn and Weis complains that the effect of the legislative history of the Detainer Agreement, as adopted by Congress in 1970 (see pages 6-8 above), is “to cut back on” or restrict the “availability of” the writ specified in 28 U.S.C. § 2241(a) and (c)(5), which has been authorized since the 18th Century. But the Detainer Agreement only provides certain consequences which follow the use of such writ and it remains fully available to the courts. Congress is free to amend P.L. 91-538 by including a definition of “detainer” which would exclude the writ provided for in 28 U.S.C. § 2241(a) and (c)(5) just as it added to the previous language of the Detainer Agreement the definitions in 18 U.S.C. App. §§ 3 and 4 when P.L. 91-538 was adopted in 1970.

^{6a} The approach of *Chico*, *supra* at page 4279, would frustrate the purpose of securing a speedy trial through requiring litigation and adjudication in each case of the issue of whether the actions of the receiving state conform not only to the language of the Detainer Agreement but also to its policies and purposes. We recognize that Congress should harmonize the time periods provided for in the Speedy Trial Act and the time requirements of the Detainer Agreement. Compare 18 U.S.C. § 3161 with 18 U.S.C. App. Article IV(c).

We cannot agree with Judge Garth's statement at page 3 of his separate opinion that “there are probably hundreds of federal prisoners, parolees, and probationers *who will be eligible to have their federal convictions vacated* under the majority's interpretation of the Agreement . . .” (Emphasis supplied.) Since this issue involves statutory interpretation of Congressional wording designed to require speedy criminal trials, there seems little justification for retroactive application of the statutory construction ultimately adopted, through collateral attack, where the defendant-prisoner has not requested a speedy trial prior to the trial. See for example *Daniel v. Louisiana*, 420 U.S. 31 (1975); *U.S. ex rel. Cannon v. Johnson*, 536 F.2d 1013, 1015-16 (3d Cir. 1976).^{6b}

The reference in note 2 of Judge Weis' separate opinion to a 1975 report of the Senate Judiciary Committee concerning completely separate proposed legislation introduced into Congress in that year but never enacted is “a hazardous basis for inferring the intent of an earlier [Congress],” *Benevento v. United States*, 461 F.2d 1316, 1322 (Ct. Cl. 1972). Similarly, the citation in note 5 of that separate opinion to a definition of “detainers” in a Handbook of the Council of State Governments written in 1949 seems to be of little relevance in interpreting a 1970 Act of Con-

^{6b} Also under the principles governing retroactive applications applied in civil cases as set forth in *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106 (1972), relied on in note 1 of Judge Garth's opinion, it would appear that this issue can well be considered as “an issue of first impression whose resolution was not clearly foreshadowed.”

gress.^{6c} See pages 6-8 above, setting forth the legislative history of the 1970 Detainer Agreement with which we are concerned.

Also, the separate opinion of Judge Garth speculates, from the absence of legislative history, that Congress did not mean what the words of Article IV(e) of the Detainer Agreement (above at note 4) provide, which policy is contrary to the position of Professor Leflar quoted in Aldisert, "The Judicial Process," at 177, 180 (1976). As pointed out above in the last paragraph of note 3, compliance with the terms of Article IV(e) of the Detainer Agreement has been worked out in the Eastern District of Pennsylvania by transfer of custody from state to federal authorities without doing violence to the language of Congress.

IV.

As noted under part II above, by adopting the Detainer Agreement in 1970, Congress intended its provisions to apply whenever a detainer had been lodged with a state jurisdiction by the Federal Government.⁷

^{6c} See Sutherland, *Statutory Construction* (4th ed.), § 48.11 at page 213, where the author states:

"Statements from other nonofficial sources having no special connection with the preparation and proposal of a bill are not generally considered for interpretation purposes."

⁷ It is clear that the Detainer Agreement applies to the United States as a "Receiving State." In *Scallion, supra*, the court said at page 1174 of 548 F.2d:

"The Government also argues that when Congress enacted the Act it intended to cast the United States in the

Also, we note that by returning Sorrell to Graterford Prison, his ability to consult with counsel was impeded, which had the potential concomitant effect of impairing his constitutional right to a speedy trial. Interference with the right to a speedy trial is inconsistent with the remedial purposes and plain statutory language of the Detainer Agreement.⁸

An order will be entered affirming the judgment of the district court.

role of a 'Sending State' and not a 'Receiving State' under the Agreement in recognition of the existing power to obtain custody of state prisoners by the use of the writ of habeas corpus ad prosequendum. We are unable to detect such intent. Article II provides that 'State' as used in the Agreement includes the United States of America. To the extent that the United States makes use of a detainer, it is a 'Receiving State' subject to the terms of the Agreement."

Accord, United States v. Mauro, supra at 593-95.

⁸ See, e.g., II at pages 5-6 above; *Esola, supra* at 833 & note 7; *accord, Mauro* at 590-91.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 76-1976

UNITED STATES OF AMERICA

v.

LOUIS THOMPSON, APPELLANT
(D. C. Crim. No. 76-22)

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Argued January 11, 1977
Before GIBBONS and GARTH, *Circuit Judges*,
and COHEN, *District Judge*Reargued en banc May 12, 1977
Before SEITZ, *Chief Judge*, and VAN DUSEN,
ALDISERT, ADAMS, GIBBONS, ROSENN, HUNTER,
WEIS and GARTH, *Circuit Judges*

OPINION OF THE COURT
(Filed August 22, 1977)VAN DUSEN, *Circuit Judge*.

On January 13, 1976, a federal grand jury sitting in the Eastern District of Pennsylvania returned Indictment No. 76-22, charging Louis Thompson in two counts for distribution of a controlled substance (heroin) in violation of 21 U.S.C. § 841.

On April 6, 1976, the district court issued a writ of habeas corpus ad prosequendum directing the United States Marshal and the Warden of the Philadelphia Detention Center to produce the defendant, then being held at the Holmesburg Prison for service of a state criminal sentence of three to twenty-three months,¹ for arraignment on April 9, 1976. On that date the defendant was arraigned at the United States Court House, 601 Market Street, Philadelphia, Pennsylvania, and then returned to state custody at the Holmesburg Prison. On May 3, 1976, the defendant appeared before the district court for trial pursuant to a second writ of habeas corpus ad prosequendum.

¹ In addition to its state function, Holmesburg Prison is regularly used by the United States for pre-trial detention for those accused of federal crimes (App. p. A-31). We note that the Government took the position at the trial that the Detainer Agreement was never invoked (A20), even though it conceded in its Answer to the Motion to Dismiss (A10) that a "federal detainer" of unspecified terms "was lodged for the instant indictment [on March 25, 1976]." No proof of this allegation in the Answer appears in the record. We can see no reason why the application of the Detainer Agreement cannot be invoked by both such a federal detainer, assuming its wording was appropriate, and a subsequently issued writ of *habeas corpus ad prosequendum*, worded in accordance with the Eastern District of Pennsylvania form (see *Sorrell, supra* at note 6).

Prior to trial the defendant filed a motion to dismiss the indictment pursuant to Article IV(e) of the Interstate Agreement on Detainers Act (the Detainer Agreement), 18 U.S.C. App. p. 232 (1977 Supp.). After oral argument, the district court denied the motion on May 3, 1976, ruling that "the Interstate Agreement on Detainers Act is not applicable in a case in which the federal government is trying a prisoner serving a state sentence within the geographical limits of the state in which the federal court is sitting." (A-30).²

On May 5, 1976, after a jury trial, defendant was found guilty on both counts of the indictment. On July 9, 1976, the defendant was sentenced to two years' imprisonment and a consecutive three-year special parole term. This appeal by defendant followed.

This court directed the listing of this appeal for rehearing en banc by order of January 28, 1977.

A summary outline of the Detainer Agreement appears in *United States ex rel. Esola v. Groomes*, 520 F.2d 830, 833-34 (3d Cir. 1975). The purposes underlying the Interstate Agreement on Detainers are set forth in an opinion filed earlier today in *United States v. Sorrell* (3d Cir. No. 76-1647).

² We reject the holding of the district court that the Detainer Agreement is not applicable where the Federal Government is trying a state prisoner serving his state sentence within the geographical limits of the state in which the federal district court is located. See *United States v. Sorrell*, 413 F. Supp. 138, 140-41 (E.D. Pa. 1976).

Particularly because the appellant was not as available to his counsel in the period between April 9, 1976, when he was produced at the United States Court House, 601 Market Street, and May 3, 1976, when he appeared for trial, as he would have been if the federal authorities had retained custody of him during this period,³ we cannot say that the failure to comply with the Detainer Agreement's purpose of having him tried with the effective assistance of counsel, promptly after his custody is first transferred from state to federal authorities is so insubstantial that the wording of Article IV(e) of the Detainer Agreement⁴ should not be applied according to its terms. If Thompson had remained in federal custody on and after April 9, the vehicles of the United States Marshal making regular weekday trips from the Holmesburg Prison to the United States Court House at 601 Market Street could have brought him to a place of easy accessibility to his lawyer, whereas a trip to Holmesburg Prison, which was required for consultation between attorney and client as long as he was in state custody and the lawyer had to go to him and return, would take his

³ See *United States v. Sorrell*, 3d Cir. No. 76-1647, at note 3.

⁴ Article IV(e) of the Detainer Agreement, 18 U.S.C. App. p. 232 (1977 Supp.), provides:

"If trial is not had on any indictment, information or complaint contemplated hereby prior to the prisoner's being returned to the original place of imprisonment pursuant to Article V(e) hereof, such indictment, information or complaint shall not be of any further force or effect, and the court shall enter an order dismissing the same with prejudice."

lawyer at least one-half a day. Furthermore, we believe the Detainer Agreement should be enforced according to its terms without the district court's being required to judge those terms, including IV(e), in the light of the Detainer Agreement's statutory purposes, as stated in Article I (see *Sorrell* at pages 5-6 of the slip opinion), every time the prosecutor chooses to ignore its wording. If Congress had wanted the district courts, in their discretion, to apply the clear provisions of Article IV(e) of the Detainer Agreement in the light of the purposes of such Agreement, such wording would have been included in Article IV(e).⁵

The judgment of the district court will be reversed and the case remanded with directions that the district court dismiss the indictment for the reasons stated above.

WEIS, *Circuit Judge*, dissenting:

The Interstate Detainers Act is obviously written to cope with problems arising when prisoners confined in one state are charged with crimes in another. Both prosecution and defense may have an interest in securing a speedy trial of outstanding charges. The state may seek to have a trial without the delay attendant on extradition. The prisoner may wish to have a determination of pending charges so that he

⁵ See last paragraph of note 3 in *United States v. Sorrell*, *supra*.

may seek the advantages of concurrent sentences or earlier parole. Moreover, the prisoner may be denied rehabilitative programs because of interruptions caused by travel and attendance at criminal proceedings in other states.

When the Interstate Detainers Act was proposed by the Council on State Governments as Suggested State Legislation in 1957, state statutes were contemplated. Not until 1970 did the federal government adopt the Act and include itself as a "state." The legislative history is quite brief and demonstrates that Congress did not fully explore the legislation's ramifications as they affected the federal government.

So long as the Act included only states and not the federal government, geographical and sovereignty concepts posed no particular difficulty. But when the federal legislation adopted the text of the state compacts and involved the United States simply by including it within the definition of a "state," serious problems of interpretation arose. As an example, the Act's reference to trial being "commenced within one hundred and twenty days of the arrival of the prisoner in the receiving State," is clear and understandable if the prisoner is being transferred from New Jersey to Pennsylvania. Similarly, a transfer from New Jersey to the District of Columbia is workable under the federal version of the Act. Confusion arises, however, if the prisoner is being transferred from a state institution in Pennsylvania to a federal court in that state. In that instance, the prisoner has been in the United States, the "receiving state", continuously.

To enforce the speedy trial provisions of the Act, therefore, the federal courts must interpret "receiving state" to mean custody of the federal government. See *United States v. Ford*, 550 F.2d 732 (2d Cir. 1977). Since this interpretation carries out the Act's announced intention to afford a speedy trial, the semantic revision may be justified. If the statute were read literally, however, there could be no enforcement of the one hundred and twenty day limitation because there is no arrival date in a "receiving state."

Similarly in Article V(h), Interstate Agreement on Detainers Act § 2, Art. V(h), 18 U.S.C. App. at 233 (Supp. 1977), the statute provides that responsibility for the prisoner rests with the receiving state from the time "a party State receives custody . . . until such prisoner is returned to the *territory and custody* of the sending State" Where the prisoner is transferred from a federal institution to a state, he has never left the United States. Does United States "territory" mean the confines of a federal institution? If a state prisoner is taken to a federal court located in the same state, when does the prisoner return to the "territory" of the state?

The government in this case has argued, as on other occasions, that Congress contemplated the federal government being affected only as a sending, not a receiving state. The interpretation makes the statute workable and reasonable.¹ The government's po-

¹ The Senate Judiciary Committee in its 1975 report on S-1 commented that the enabling Act should be amended by "pro-

sition, however, has been consistently rejected in the courts reviewing it. See *United States v. Mauro*, 544 F.2d 588 (2d Cir. 1976), *United States v. Scallion*, 548 F.2d 1168 (5th Cir. 1977). Article II, 18 U.S.C. App. at 230-231 (Supp. 1977), defines the United States as a "state" without any qualification, and the legislative history furnishes no support for the government's interpretation. It is apparent that in adopting the Interstate Agreement Congress has attempted to fit a square peg into a round hole.

In *United States ex rel. Esola v. Groomes*, 520 F.2d 830 (3d Cir. 1975), a panel of this court concluded that the Agreement on Detainers Act is the sole means by which a prisoner may be transferred from another state for trial on state charges. In the case *sub judice*, that principle is extended to the federal system as well, thus restricting the writ of habeas corpus ad prosequendum.

Congress, I am confident, had no intention to limit federal courts in exercising their power to issue this writ first authorized by the Judiciary Act of 1789. The grant has been continued without interruption in legislation since that time. See *Carbo v. United States*, 364 U.S. 611 (1961); *Ex parte Bollman*, 4 Cranch 75 (1807). Not a word in the legislative history of the Interstate Agreement on Detainers Act

viding that the Federal Government is a participant in the Agreement only in the capacity of a 'sending state.'" Sen. Rep. 94-00, 94th Cong., 1st Sess. 983-984 (1975).

hints of repealing or limiting the authority to issue the writ or, indeed, even mentions it.²

To read the ambiguous and superficially considered Agreement as constricting the power which has been exercised by the federal courts for almost two hundred years is a questionable solution to a perplexing problem. Recognizing the continuing scope of the writ of habeas corpus ad prosequendum

² In the Senate Judiciary Committee report in 1975, referred to in n.1 supra, it is said:

"Federal prosecution authorities and all Federal defendants have always had and continue to have recourse to a speedy trial in a Federal court pursuant to 28 U.S.C. 2241(c) (5), the Federal writ of *habeas corpus ad prosequendum*. The Committee does not intend, nor does it believe that the Congress in enacting the Agreement in 1970 intended, to limit the scope and applicability of that writ.

"Unlike the existing Federal statute, however, the State statutes do not provide a writ of *habeas corpus ad prosequendum* with nationwide territorial effect beyond the boundaries of the issuing State. Consequently, since the Agreement is only effective between member States, the Federal Government, at the urging of the Council of State Governments, has become a member State so that the other member States may use the Agreement to reach Federal prisoners against whom State detainers have been lodged who are incarcerated outside the lodging State's territorial boundaries.

"Clarification of the enabling act is necessary because at least one Federal court has indicated that in the absence of specific language to the contrary, it will interpret the Agreement to apply to all prisoner exchanges between member States and the Federal Government, thereby negating all use of 28 U.S.C. 2241(c) (5), the Federal writ of *habeas corpus ad prosequendum*, between the Federal Government and other member States."

might diminish in some respects the efficacy of the Interstate Detainers Act. That policy would offer federal prosecutors an alternative method of securing the presence of state prisoners for trial and, thus, deprive a state governor of the option to disapprove the request (a doubtful matter at best in the federal-state context); obviate the thirty day delay; and delete the requirement that the prisoner be kept in federal custody from time of original request to termination of trial. But the utilization of habeas corpus ad prosequendum would not defeat the primary aims of the Agreement—to permit the prisoner and authorities to obtain speedy disposition of outstanding detainers and prevent unnecessary interruptions to rehabilitative programs.

The facts of the two cases under consideration are graphic illustrations of the harm which restricting federal habeas corpus ad prosequendum can cause. In the *Sorrell* case, the interruption of the prisoner's rehabilitation program at Graterford consisted of the time for travel between Graterford and Philadelphia and a brief appearance in court for arraignment (certainly not a whole day), and the trial which would likely have required no more than a few days. All told, the prisoner's absence from the rehabilitation program would likely have been no more than a total of 7 to 10 days. Under the majority's view, however, *Sorrell* would have had to remain in federal custody from the date of arraignment till verdict, normally at least a month. That period of confinement would usually be in a facility in Philadelphia which does not

offer rehabilitation programs. Thus, the goal of rehabilitation is not aided by the restrictive approach adopted by the majority, but is actually thwarted.

Moreover, the aim of a speedy trial would be hindered, not helped. The Federal Speedy Trial Act limits require that a prisoner be arraigned within ten days after indictment, 18 U.S.C. § 3161, but if his presence at that proceeding can only be obtained by recourse to the Detainers Act, a thirty-day period must elapse before he may be transported to the court. Article IV(a), 18 U.S.C. App. at 232 (Supp. 1977). Thus, there is a direct conflict between the Speedy Trial Act and the Detainers Act which the majority's interpretation does not resolve but, in fact, creates.³

The situation created in the *Thompson* case is even more bizarre. He was serving a state sentence in the Holmesburg Prison in Philadelphia in April, 1976. On April 9, through the use of habeas corpus ad prosequendum, Thompson was brought to the federal courthouse in the same city for arraignment and was returned on the same day. He was returned to the courthouse on May 3 for trial, and on May 6, a guilty

³ The majority relies to some extent upon an asserted inconvenience to defense counsel as a ground for its interpretation of the statute. I find that basis unconvincing on the facts of these cases. If the transfers here had been within the state's jurisdiction, the removal of a prisoner from a penitentiary in Pittsburgh to a Pennsylvania court in Philadelphia, some 300 miles away, would involve more inconvenience than that present here. However, that, in and of itself, would be an unlikely ground for vacating a conviction.

verdict was rendered. That conviction is now set aside as a result of the majority opinion.

Apparently, there was no rehabilitative program at Holmesburg, that institution being used only for short term sentences and pretrial detention.⁴ Hence, no rehabilitation program was interrupted. The ultimate irony, however, is that the federal government and Philadelphia have contracted for the use of Holmesburg Prison as a detention center for federal prisoners. Thus, had the United States arranged for the technical "paper" transfer of Thompson from state to federal custody—within the very same institution—from the arraignment date to the date of sentencing, the conviction would stand.

In *United States v. Mauro*, *supra*, the Court of Appeals affirmed dismissals of indictments under the provisions of the Detainers Act. Judge Mansfield dissented on the ground that the writ of habeas corpus ad prosequendum was not a detainer within the meaning of the Act,⁵ and refused to accept any implied re-

⁴ In *United States v. Roberts*, 548 F.2d 665 (6th Cir. 1977), the court held that the Act did not apply to a pretrial detainee who was not participating in any rehabilitation program.

⁵ Despite dictum in the majority opinion, that point is not at issue here since in both cases detainers in the customary form had been lodged by the United States Marshal before the writs of habeas corpus were served. However, I agree with the Courts of Appeals for the First Circuit, *United States v. Kanaan*, — F.2d — (No. 77-1014, July 7, 1977); the Fifth Circuit, *United States v. Scallion*, *supra*; the Sixth Circuit, *Ridgeway v. United States*, — F.2d — (No. 76-2145, July 13, 1977); and the dissenting opinion of Judge Mansfield in *Mauro*, *supra*, that a federal writ of habeas corpus

peal of the statute authorizing habeas corpus ad prosequendum. In *United States v. Ford*, *supra*, he wrote the majority opinion, holding that the speedy trial provisions of the Detainers statute applied to the federal government. In *United States v. Chico*, — F.2d — (No. 77-1016, 2d Cir., June 20, 1977), Judge Mansfield, writing for a unanimous panel, distinguished both *Ford* and *Mauro* in a fact situation similar to the case *sub judice*. There, the Court of Appeals for the Second Circuit held that when state prisoners were in the federal court for only the few hours required for arraignment and guilty pleas and were immediately returned to state imprisonment, they were never actually incarcerated by the federal government. That distinction could be utilized in the *Thompson* and *Sorrell* cases, but I think the better approach is to take the view espoused by the Courts of Appeals for the First and Sixth Circuits and to uphold the unrestricted avail-

ad prosequendum does not come within the meaning of the word "detainer" as used in the Act.

The handbook on Interstate Crime Control of the Council of State Governments (1949) contains a report of the joint committee on detainers, stating in part:

"A detainer may be defined as a warrant filed against a person already in custody with the purpose of insuring that, after the prisoner has completed his present term, he will be available to the authority which has placed the detainer. Wardens of institutions holding men who have detainers on them invariably recognize these warrants and notify the authorities placing them of the impending release of the prisoner." (page 85)

ability of habeas corpus ad prosequendum. See *United States v. Kenaan*, *supra*, *Ridgeway v. United States*, *supra*.

I disagree with the majority opinion, but in fairness must recognize the difficulties caused by this poorly drafted legislation. The Act has created a problem which Congress should resolve expeditiously in the interest of efficient administration of criminal justice.

I dissent.

Judge Adams and Judge Rosenn join in the conclusion reached in this dissent, primarily because they do not believe it should be assumed that Congress has cut back on an enactment as venerable as that of the Judiciary Act of 1789 in the absence of an express statement that Congress intended to do so.⁶

GARTH *Circuit Judge*, dissenting:

On April 9, 1976, Louis Thompson, the defendant in one of these two cases, was serving a state sentence in the Holmesburg Prison, a state facility located in the Northeastern portion of Philadelphia.

⁶ Such a result would appear to be particularly appropriate here since the documents directing the transfer of the defendants to federal authorities were specifically denominated as "writs of habeas corpus ad prosequendum." And there is no indication on the record that, at the time of such transfer, the United States Attorney or the defense counsel were operating under the assumption that the Interstate Detainers Act was then being utilized.

One week earlier, a federal district court judge in the Eastern District of Pennsylvania had issued a writ of habeas corpus *ad prosequendum* directing the warden of the Detention Center to deliver Thompson to United States marshals so that Thompson could be arraigned on federal charges at ten a.m. on April 9, 1976. On the morning of April 9, United States marshals took Thompson from Holmesburg Prison and transported him to United States Courthouse at 601 Market Street in center city Philadelphia. The distance travelled was less than ten miles. Thompson entered a plea of not guilty on a federal indictment which charged him with two counts of distributing heroin in violation of 21 U.S.C. § 841. After his arraignment, Thompson was promptly returned to Holmesburg. At that point, in the majority's view, the federal and state authorities erred. Instead of placing Thompson in the portion of Holmesburg in which federal prisoners are housed pursuant to a contract between the United States and the City of Philadelphia, Thompson was returned to the very cell from which he had been taken that morning. In addition, the United States did not begin to pay the City the dollar *per diem* to which state facilities which house federal prisoners are entitled.

When Thompson's attorney learned what had occurred, he moved on April 29 to have his client's federal indictment dismissed under the Interstate Agreement on Detainers, to which the United States is a party. That motion was denied; and, after a jury trial, Thompson was convicted on both counts and sentenced. The majority now holds that Thomp-

son's federal indictment must be dismissed with prejudice—a remedy more severe than that which results in most instances in which the government commits constitutional violations.

The facts in the case of Leroy Sorrell—the defendant in the second case—are not notably different from those set out above, except that Sorrell was subjected to the more arduous journey from the State Correctional Institution at Graterford to the United States Courthouse in Philadelphia, a distance of less than 35 miles.

I must dissent from the results reached by the majority in these two cases. If I felt that Congress intended such absurd results when it made the United States a party to the Agreement, I would of course honor Congress's intent. But I seriously doubt that a single member of Congress contemplated that federal indictments would be dismissed with prejudice in situations such as these.

The legislative history makes this clear. When Representative Robert W. Kastenmeier introduced the Agreement in the House on May 4, 1970, he stated, "We know of no opposition whatsoever to this legislation." 116 Cong. Rec. 13999 (1970). Similarly, when Senator Roman Hruska introduced the Agreement in the Senate, he stated, "To the knowledge of this Senator, there is no opposition to this proposal." 116 Cong. Rec. 38840 (1970). The Agreement was twice passed by the House under suspension of the rules. 114 Cong. Rec. 11796 (1968); 116 Cong. Rec. 14000 (1970). It also passed in the Senate without a roll call vote. 116 Cong. Rec. 38842 (1970). The

idea that there would have been "no opposition whatsoever" to the sort of results which have occurred in these cases is hard to accept. That idea is even harder to accept when one realizes that there are probably hundreds of federal prisoners, parolees, and probationers who will be eligible to have their federal convictions vacated under the majority's interpretation of the Agreement.¹

To date four other circuits have decided similar cases under the Agreement. Although the cases decided by those circuits—the First, Second, Fifth, and Sixth—disagree on some points, none would require the dismissal of the defendants' indictments in these cases. See *United States v. Scallion*, No. 74-4246 (5th Cir., filed March 18, 1977) (Agreement does not apply when prisoner transferred pursuant to federal writ of habeas corpus *ad prosequendum*); *United States v. Kenaan*, No. 77-1014 (1st Cir., filed July 7, 1977) (similar to *Scallion*); *Ridgeway v. United*

¹ The majority opinion takes issue with my prediction that federal convictions will be vacated under the majority's interpretation. Obviously the interpretation adopted by the majority will be available in all future cases similar to those considered today. With respect to retroactive application, I question whether the majority's decision is one which can be made nonretroactive. In light of the majority's heavy reliance on *Esola*, it is quite clear that *Thompson* and *Sorrell* do not "establish a new principle of law . . . by overruling clear past precedent on which the litigants may have relied" [*Chevron Oil Co. v. Huson*, 404 U.S. 97, 106 (1971)] and it is questionable whether those cases decide "an issue of first impression whose resolution was not clearly foreshadowed. . . ." *Id.* As a result, it is uncertain that the prerequisites for non-retroactivity can be met.

States, No. 76-2145 (6th Cir., filed July 13, 1977) (similar to *Scallion*); *United States v. Chico*, No. 77-1016 (2d Cir., filed June 20, 1977) (Article IV (e) of Agreement does not apply when state prisoners taken from state prisons pursuant to federal writs of habeas corpus and returned within a few hours and without being placed in a federal prison).

I.

The defendants in these cases do not argue that their indictments should be dismissed on policy grounds. Instead, they ask us to refrain from "judicial legislation,"^{1a} and they admonish us that "[s]tatutes should be applied as written by Congress."² I am convinced, however, that the terms of the Agreement do not require the dismissal of the indictments in these cases.

The majority holds that the indictments must be dismissed with prejudice because Article IV(e) of the Agreement was violated. That provision states

If trial is not had on any indictment, information, or complaint contemplated hereby *prior to the prisoner's being returned to the original place of imprisonment pursuant to article V(e) hereof*, such indictment, information, or complaint shall not be of any further force or effect, and the

^{1a} Brief for Appellant at 8, *United States v. Thompson*, No. 76-1976.

² *Id.* at 9. See also Brief for Appellee at 19, *United States v. Sorrell*, No. 1647.

court shall enter an order dismissing the same with prejudice.

(Emphasis added.) Article V(e), in turn, provides:

At the earliest practicable time consonant with the purposes of this agreement, the prisoner shall be *returned to the sending state*.

(Emphasis added.)

Finally, Article II (a) and (b) state:

As used in this agreement:

(a) "*State*" shall mean a State of the United States; *the United States of America*; a territory or possession of the United States; the District of Columbia; the Commonwealth of Puerto Rico.

(b) "*Sending State*" shall mean a State in which a prisoner is incarcerated at the time that he initiates a request for final disposition pursuant to article III hereof or at the time that a request for custody or availability is initiated pursuant to article IV hereof.

(Emphasis added.)

Thus the majority holds that the indictments in these cases must be dismissed with prejudice because the defendants were *returned to the sending State*, i.e., *Pennsylvania* before their federal trials were completed. But in what sense were the defendants *returned* to Pennsylvania? They obviously were not returned in a geographical sense, since they never left the geographical boundaries of Pennsylvania. Instead, the majority's holding is based upon the

theory that Article IV(e) of the Agreement was triggered in these cases because the defendants were transferred from state *custody* to federal *custody* and back to state *custody* before their federal trials were completed.³ It seems clear, however, that the draftsmen of the Agreement never intended transfers of custody to be the triggering events under Article IV(e).

Art. V(a) states in part:

In the case of a Federal prisoner, the appropriate authority in the receiving State shall be entitled to temporary custody as provided by this agreement *or to the prisoner's presence in Federal custody at the place of trial*, whichever custodial arrangement may be approved by the custodian.

(Emphasis added.) Thus, when a state wishes to obtain a federal prisoner pursuant to the agreement, the federal government is never required to surrender "custody" of the prisoner. It can simply make the

³ In *Thompson*, see Maj. Op. at 2, 3, 4. In *Sorrell*, see Maj. Op. at 4.

The crux of Thompson's argument is: "The return of appellant to state *custody* subsequent to his arraignment but prior to trial was a clear violation of Article IV(e). . . ." (Emphasis added.) Brief for Appellant at 6, *United States v. Thompson*, No. 76-1976. Similarly, Sorrell's counsel maintains that his client's indictment must be dismissed because "Mr. Sorrell was arraigned and returned to state *custody* rather than being retained in federal *custody* at the Philadelphia Detention Center." (Emphasis added.) Brief for Appellee at 7, *United States v. Sorrell*, No. 76-1647.

prisoner available for trial in state court while retaining custody of the prisoner. It is rather hard to believe that transfers of custody were intended to be the triggering events under Article IV(e) when another portion of the Agreement, Article V(a) includes a built in mechanism under which the federal government can always retain "custody" of a prisoner requested by another jurisdiction.

What is more, the draftsmen of the Agreement stated explicitly that they believed that the states could also comply with the agreement in a sending capacity without ever relinquishing "custody" of prisoners demanded by other jurisdictions. In the report which accompanied the Agreement when it was first proposed, the draftsmen wrote:

Some thought was given to giving all jurisdictions the same option afforded the federal authorities in determining whether to give temporary custody or simply to make the prisoner available in their own custody. However, it was felt that in effect the states could achieve this same result by the process of deputizing officers to act for them. Moreover, in most instances it is not contemplated that states will find it convenient to make the prisoner available in their own custody.

Council of State Government, Suggested State Legislation, Program for 1957 at 79 (1956); Council of State Government, Suggested State Legislation, Program for 1958 at 82 (1957). In other words, the draftsmen felt that if, say, Pennsylvania sought to try a New Jersey prisoner, New Jersey could comply

with the agreement and still retain "custody" of the prisoner by deputizing the Pennsylvania sheriff to whom the prisoner was delivered. Indeed, as far as the draftsmen were concerned, New Jersey could deputize the United States Marshal into whose custody it delivered a prisoner requested by the federal government. It simply is inconceivable that the draftsmen would have happily contemplated those possibilities if transfers of "custody" were viewed as the triggering events under Art. IV(e).

Article V (d) and (g) of the Agreement provide further evidence that transfers of "custody" were not viewed by the draftsmen as the triggering events. Article V (g) attempts to explain who has custody of a prisoner temporarily released by one jurisdiction pursuant to a detainer lodged by another jurisdiction. It provides in relevant part:

For all purposes other than that for which temporary custody as provided in this agreement is exercised, the prisoner shall be deemed to remain in the custody of and subject to the jurisdiction of the sending State. . . .

(Emphasis added.) Article V (d) states that "[t]he temporary custody referred to in this agreement shall be *only for the purpose of permitting prosecution*" on the charges lodged by the receiving state. It would seem to follow, therefore, that a prisoner who is delivered to a receiving state under the Agreement remains in the custody of the sending state for all purposes other than his prosecution by the receiving state.

Does that mean then that for the purpose of Article IV(e)—i.e., dismissal of the prisoner's indictment in the receiving state—the prisoner remains at all times in the custody of the sending state? It is inconceivable that the draftsmen would have created these ambiguities concerning the “custody” of a prisoner transferred from one jurisdiction to another under the Agreement if transfers of “custody” had been viewed as critical under Article IV(e).

In addition, if “custody” is the key under Article IV(e), then the application of Article IV(e) to many federal and state prisoners will raise questions of metaphysical subtlety. In whose “custody,” for example is a prisoner who is serving concurrent state and federal sentences in a state facility? See *Tre-marco v. United States*, 412 F. Supp. 550, 553 (D. N.J. 1976).

In whose “custody” is a prisoner serving concurrent state and federal sentences in a federal facility?

In whose “custody” is a federal prisoner confined in a state facility pursuant to a contract between the United States and the relevant state? Under 18 U.S.C. § 4082 (a), all persons incarcerated for federal offenses are committed to “the custody of the Attorney General of the United States.” But under 18 U.S.C. § 4002 the federal government is obligated to pay the states for “the care and custody” of persons confined in state institutions for offenses against the United States. And under Pa. Stat. Ann., Tit. 61, § 41 (1964), the “custody” of such prisoners is vested in the state authorities.

In whose “custody” is a person who has been convicted of state offenses but is confined in a federal facility pursuant to a contract between the respective jurisdictions? Under 18 U.S.C. § 5003 (a), the “custody, care,” etc. of such persons is committed to the Attorney General of the United States. But I would suspect that most states would regard all persons imprisoned for state offenses as being in state “custody.”

Finally, in whose “custody” is a person convicted of an offense in one state (say, Pennsylvania) but imprisoned in another (say, New Jersey) pursuant to the Interstate Corrections Compact, which has been adopted by 22 states? See N.J. Stat. Ann., title 30, § 7C—1 *et seq* (1977); Pa. Stat. Ann., title 61, § 1061 *et seq* (1977); Del. Code Ann., title 11, § 6570 *et seq* (1975).

In sum, it seems clear to me that transfers of “custody” are not the triggering events under Article IV (e). As a result, the defendants' argument that they are entitled to have their indictments dismissed under the literal language of the Agreement must fail.

II.

I have argued at length in the preceding section that the key phrase “returned to the sending state” cannot be read to mean “returned to the custody of the sending state.” It seems equally clear that, as long as the United States is regarded as a “state” within the meaning of the Agreement, the phrase “returned to the sending state” cannot be interpreted

to mean "returned to the geographical area of the sending state." If that interpretation were adopted, then Article IV (e) would never be triggered in instances in which the United States was the sending state. Even if a federal prisoner incarcerated in Pennsylvania were taken to California to face state charges and then returned to Pennsylvania, he could not be said to have "returned" to the geographical area of the United States, since it is quite apparent that at no time had he ever left the United States.

The plain fact is that the literal language of the Agreement—which does not appear to have caused any problems with respect to transfers between states—simply does not make sense when applied to transfers involving the federal government. The reason for this anomaly seems clear: the Agreement appears to have been drafted with state-to-state transfers primarily in mind.

Besides the provisions already discussed, there is additional evidence in the Agreement itself and in the report which accompanied it to support this view. Article IV (a), for example, provides in part that "the Governor of the sending state may disapprove the request for temporary custody or availability, either upon his own motion or upon motion of the prisoner." The report explains that this provision preserves "a Governor's right to refuse to make a prisoner available (on public policy grounds)" Council of State Governments, *Suggested State Legislation, Program for 1957* at 78 (1956). These state-

ments made sense with respect to state-to-state transfers, because prior to the adoption of the agreement governors had the power to deny another state's request for extradition. However, these statements do not make sense with respect to federal-state⁴ transfers, since states apparently have always honored federal writs of habeas corpus *ad prosequendum*. *United States v. Kenaan*, *supra*, at 7 n.8; *United States v. Mauro*, 544 F.2d 588, 596 (2d Cir. 1976) (Mansfield, J., dissenting).

Article V (h) also illustrates that the Agreement was framed primarily to deal with the problems of the states. That provision states in part:

From the time that a party State receives custody of a prisoner pursuant to this agreement until such prisoner is returned to the *territory* and custody of the sending State, the State in which the one or more untried indictments, informations, or complaints are pending or in which trial is being had shall be responsible for the prisoner and shall also pay all costs of transporting, caring for, keeping, and returning the prisoner.

(Emphasis added.) As I have explained, it does not make sense to speak of a return to the "territory . . . of the sending state" when that "state" is the United States.

⁴ I have used the term "federal-state" transfers to refer to transfers in which the federal government participates in a sending or receiving capacity.

Finally, the report which accompanied the Agreement when it was first proposed by the Council of State Governments stated flatly:

[T]he only way that a prosecuting official can secure for trial a person already imprisoned in another jurisdiction is by resort to a cumbersome special contract with the executive authority of the incarcerating state. Because of the difficulty and red tape involved in securing such contracts they are little used. . . . [The Agreement] provides a method whereby prosecuting authorities may secure prisoners incarcerated in other jurisdictions for trial before the expiration of their sentences.

Council of State Governments, Suggested State Legislation, Program for 1957 at 78 (1956). These statements were true with respect to the states but incorrect with respect to the federal government, since the federal government had no trouble obtaining state prisoners for trial by means of writs of habeas corpus. *United States v. Kenaan*, *supra*, 7 n. 8; *United States v. Mauro*, 544 F.2d 588, 596 (2d Cir. 1976) (Mansfield, J., dissenting).

It is not hard to surmise why the Agreement was framed with state problems principally in mind: the drafting of the Agreement appears to have been dominated by organizations primarily concerned with state law. The process which led to the Agreement was set in motion in 1948 when the Council of State Governments appointed a committee "to consider possible solutions to problems caused by the placing of

detainers." Council of State Governments, *The Handbook on Interstate Crime Control* 85 (1949 ed). This committee, known as the Joint Committee on Detainers, consisted of three members from each of the following organizations: the National Conference of Commissioners on Uniform State Laws, the National Association of Attorneys General, the Association of Administrators of the Interstate Compact for the Supervision of Parolees and Probationers (each of the 45 party states appointed one administrator), the American Prison Association, and the Section on Criminal Law of the American Bar Association. *Id.* The Joint Committee adopted five "guiding principles" for dealing with the problems caused by detainers (*id.* at 88-89), but it failed to recommend specific legislation.

"During 1955 and 1956 the old Joint Committee on Detainers was informally reconstituted under the auspices of the Council of State Governments. . . ." Council of State Governments, Suggested State Legislation, Program for 1959 at 167 (1958). In addition, representatives from the following organizations were added: the National Association of County and Prosecuting Attorneys, the National Probation and Parole Association, and the Federal Bureau of Prisons. This expanded committee held three meetings and approved three specific pieces of proposed legislation developed by the Council of State Governments. *Id.*; New York State Legislative Annual—1957 at 42 (1957). The first two measures concerned purely *intrastate* problems. The "Parole to Detainer Act" permitted state

parole boards "to release prisoners on parole to answer warrants from other jurisdictions." Council of State Governments, Suggested State Legislation, Program for 1957 at 74, 76 (1956). A measure subsequently labelled the "Uniform Mandatory Disposition of Detainers Act"—and modelled on statutes enacted by California and Oregon—enabled a prisoner to secure disposition of detainers lodged by the state in which he was confined. Council of State Governments, Suggested State Legislation, Program for 1959 at 167 (1959); 9B Unif. Laws Ann. 1011. The third measure recommended by the Committee was the Interstate Agreement on Detainers. The draftsmen described that Agreement as an application of "the same principles embodied in the intrastate act to the interstate field." Council of State Governments, Suggested State Legislation, Program for 1957 at 78 (1956).

Not only did state problems dominate the drafting process, but during the first 14 years of its existence the Agreement governed only state-to-state transfers.

It would not be accurate to suggest, however, that the effect of the Agreement on the federal government was never considered from the beginning of the drafting process in 1948 to the enactment of the Agreement by Congress in 1970. The effect of the Agreement upon the federal government was occasionally considered, but for some reason its effect on the United States in a *receiving capacity* was never discussed. Virtually every reference to the United States mentioned the federal government in a sending capacity only. For example, in 1945 and again in

1959 the director of the Federal Bureau of Prisons wrote articles for the journal *Federal Probation* in which he described the problems caused by state detainers lodged against federal prisoners. Bennett, The Correctional Administrator Views Detainers, 9 Fed. Prob. 8 (1945); Bennett, "The Last Full Ounce," 23 Fed. Prob. 20 (1959). Similarly, during the early 1960s the Federal Bureau of Prisons urged Congress to make the United States a party to the Agreement so that state detainers filed against federal prisoners could be disposed of. Note, Convicts—The Right to a Speedy Trial and the New Detainer Statutes, 18 Rut. L. Rev. 828, 856 & n. 236 (1964). When the House and Senate Judiciary Committees issued reports on the Agreement in 1968 and 1970, those reports discussed the need for federal participation solely in terms of the effect which the Agreement would have on federal prisoners with outstanding state detainers. House Judiciary Committee, Enacting the Interstate Agreement on Detainers into Law, H.R. Rep. 1332, 90th Cong., 2d Sess. 3-4 (1968); House Judiciary Committee, Enacting the Interstate Agreement on Detainers into Law, H.R. Rep. 91-1018, 91st Cong., 2d Sess. 3 (1970); Senate Judiciary Committee Interstate Agreement on Detainers Act, S. Rep. 91-1356, 91st Cong., 2d Sess. [1970 U.S. Code Cong. & Admin. News 4866] (1970). The leading speeches in Congress took the same approach. 114 Cong. Rec. 11795 (1968) (remarks of Rep. Kastenmeier; only speech on bill); 116 Cong. Rec. 13999 (1970) (re-

marks of Rep. Kastenmeier); 116 Cong. Rec. 38841 (1970) (remarks of Sen. Hruska; only speech on bill).

I do not point to these facts to suggest that we should accept the government's argument that the United States became a party to the Agreement in a receiving capacity only. I note them only to explain why the impossibility of applying Article IV (a) to the federal government appears to have gone unnoticed. When the federal government acts in a sending capacity, the burden of complying with Article IV (e) falls upon the state which requests the federal prisoner, and when the states obtain federal prisoners for trial they apparently treat those transfers exactly as if they were state-to-state transfers. As a result, they do not seem to have any problems with Article IV (e). It is when the federal government acts in a receiving capacity that the problem of applying the Agreement to the federal government is posed in its starkest form.

III.

I have attempted to show that the Interstate Agreement on Detainers was designed to govern state-to-state transfers and that it is impossible to apply the literal language of that Agreement to the federal government. Corrective legislation is clearly needed to remedy the problems caused by federal participation in the Agreement. Until Congress acts, however, it seems to me that we must try to make as much sense out of the Agreement as we can. See *Commissioner v. Brown*, 380 U.S. 563, 571 (1965).

This can be done best, in my view, by applying Article IV(e) in cases involving federal-state transfers precisely as it would be applied in cases involving analogous state-to-state transfers. State-to-state transfers which trigger Article IV(e) invariably have the following three characteristics. First, state boundaries are crossed. Second, a prisoner confined for violating the laws of one jurisdiction is taken to face charges under the laws of another jurisdiction. Finally, the affected prisoner is returned to a facility operated by the same jurisdiction as the facility from which he was taken. Unless a federal-state transfer has these three characteristics, I would not hold that Article IV(e) has been activated.

A few examples will illustrate this point. Let us suppose that a state prisoner confined in a state prison in New York was brought to Newark, New Jersey, to face federal charges and then returned to the state prison in New York. In that situation I would hold that Article IV(e) had been triggered, because that transfer would be analogous to a transfer from a state facility in New York to a state courthouse in New Jersey to face state charges and then back to New York.

If a federal prisoner were taken from the Federal Correctional Institution in Danbury, Connecticut to a state courthouse in New Jersey and then back to Danbury, I would hold that Article IV(e) was triggered. *United States ex rel Esola v. Groomes*, 520

F.2d 830 (3d Cir. 1975).⁴ That transfer would be analogous to a transfer from a state prison in Connecticut to a state court in New Jersey and then back to a state prison in Connecticut.

If a state prisoner were taken from the Philadelphia Detention Center, a state facility, to federal court in Camden and then back to the Philadelphia Detention Center, I would hold that Article IV(e) had been triggered. This holding may seem unwise from a policy standpoint. However, there is no question that Article IV(e) would be triggered if a state prisoner were transferred from the Philadelphia Detention Center to a state court in Camden and then back to Philadelphia. If Article IV(e) is triggered in the latter situation, I see no reason why it should not be in the former as well.

On the other hand, I would hold that Article IV(e) was not triggered in the two cases *sub judice* because state boundaries were not crossed. Thus in the two transfers with which we are concerned, where both occurred within the Commonwealth of Pennsylvania and where neither would have triggered the Agreement if the federal government had not been involved, the Agreement should not be deemed to have been violated.

⁴ *Esola* can be read as being limited to the precise context of a federal prisoner obtained by a state writ for state processing. That reading does no violence to the principle espoused in Judge Weis' dissent, which involves only the issuance of a writ by a federal authority seeking to obtain a state prisoner for federal processing.

Similarly, if a federal prisoner was taken from a federal prison in Connecticut to face federal charges in New Jersey and then returned to the federal prison in Connecticut, I would hold that Article IV(e) was not triggered because the second characteristic of state-to-state transfers which trigger Article IV(e) was not present, i.e., the prisoner, having previously been convicted of offenses under *Federal* law, was not brought to New Jersey to face charges *under the laws of another jurisdiction*.

I do not propose this construction of the Agreement as anything other than a stopgap interpretation which can be applied until Congress takes corrective action and which will afford a workable analysis for the district courts in their future encounters with this legislation. But it seems to me that this interpretation is the best we can do at present, since we are constrained to apply to the federal government an act (the *Interstate* Agreement on Detainers) which was designed to govern *inter-state*, not *intra-state* or federal-state,⁵ transfers. The alternative to this interpretation is what the majority has done today, i.e., to dismiss indictments which the Agreement was never intended to affect and which are otherwise perfectly sound. The federal government simply is not a state, and the mere fact that it is defined as a "state" under the Agreement does not mean the provisions of the Agreement which

⁵ And certainly not intra-city transfers as the majority holds in dismissing Thompson's indictment.

were designed to apply to states can be applied to the United States in a rational way. Just as a horse is not a bird, it cannot share a bird's characteristics, appearance, or attributes.⁶ In like fashion, an air-

⁶ But see Memo of W. Barton Leach in Harv. L. Sch. Bull., April 1972, suggesting the following headnote for Reg. v. Ojibway, 8 Crim. L.Q. 137 (1965):

Is a pony, fortuitously saddled with a feather pillow, a "small bird" within the meaning of the Ontario Small Birds Act?

A pertinent portion of the text of Reg. v. Ojibway, construing a statute prohibiting the killing of small birds, reads:

BLUE, J.: This is an appeal by the Crown by way of a stated case from a decision of the magistrate acquitting the accused of a charge under the Small Birds Act, R.S.O., 1960, c.724, s.2. The facts are not in dispute. Fred Ojibway, an Indian, was riding his pony through Queen's Park on January 2, 1965 Being impoverished, and having been forced to pledge his saddle, he substituted a downy pillow in lieu of the said saddle. On this particular day the accused's misfortune was further heightened by the circumstances of his pony breaking its right foreleg. In accord with current Indian custom, the accused then shot the pony to relieve it of its awkwardness.

The accused was then charged with having breached the Small Birds Act, n. 2 of which states:

2. Anyone maiming, injuring or killing small birds is guilty of an offence and subject to a fine not in excess of two hundred dollars.

The learned magistrate acquitted the accused, holding, in fact, that he had killed his horse and not a small bird. With respect I cannot agree.

In light of the definition section my course is quite clear. Section I defines "bird" as "a two-legged animal

plane is not an automobile, and a statute which defines a plane as a "motor vehicle" could hardly be construed to make local traffic regulations applicable to that particular type of conveyance.

I would reverse the order of the district court dismissing the indictment in United States v. Sorrell, No. 76-1647, and I would affirm the district court in United States v. Thompson, No. 76-1976. In neither case would I require the dismissal of the federal indictments at issue. I therefore dissent.

covered with feathers." There can be no doubt that this case is covered by this section.

Counsel for the accused made several ingenious arguments to which, in fairness, I must address myself. He submitted that the evidence of the expert clearly concluded that the animal in question was a pony and not a bird, but this is not the issue. We are not interested in whether the animal in question is a bird or not in fact, but whether it is one in law. *Statutory interpretation has forced many a horse to eat birdseed for the rest of its life.*

(Emphasis added).

50a

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 76-1647

UNITED STATES OF AMERICA, APPELLANT

vs.

LEROY SORRELL

(D.C. Criminal No. 76-165)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Present: SEITZ, *Chief Judge* and VAN DUSEN, ALDI-
SERT, ADAMS, GIBBONS, ROSENN, HUNTER,
WEIS and GARTH, *Circuit Judges*

JUDGMENT ON REHEARING

This cause came on to be heard on the record from
the United States District Court for the Eastern
District of Pennsylvania and was argued by counsel

51a

on November 18, 1976 and reargued en banc May
12, 1977.

On consideration whereof, it is now here ordered
and adjudged by this Court that the judgment of the
said District Court, entered May 4, 1976, be, and the
same is hereby affirmed.

ATTEST:

/s/ Thomas F. Quinn
Clerk

August 22, 1977

52a

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 76-1976

UNITED STATES OF AMERICA

vs.

LOUIS THOMPSON, APPELLANT
(D.C. Criminal No. 76-22)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Present: SEITZ, *Chief Judge* and VAN DUSEN, ALDI-
SERT, ADAMS, GIBBONS, ROSENN, HUNTER,
WEIS and GARTH, *Circuit Judges*

JUDGMENT ON REHEARING

This cause came on to be heard on the record from
the United States District Court for the Eastern
District of Pennsylvania and was argued by counsel
on January 11, 1977 and reargued en banc on May
12, 1977.

53a

On consideration whereof, it is now here ordered
and adjudged by this Court that the judgment of
the said District Court, entered July 9, 1976, be,
and the same is hereby reversed and the cause re-
manded with directions that the district court dis-
miss the indictment in accordance with the opinion
of this court.

ATTEST:

/s/ Thomas F. Quinn
Clerk

August 22, 1977

APPENDIX E

UNITED STATES DISTRICT COURT
E. D. PENNSYLVANIA

Crim. No. 76-165

UNITED STATES OF AMERICA

v.

LEROY SORRELL

May 4, 1976

OPINION

JOSEPH S. LORD, III, *Chief Judge*.

Defendant has been charged in a two count indictment with unlawful possession of a firearm. He has moved to dismiss the indictment with prejudice. We will grant the motion.

Defendant is now confined in the State Correctional Institution at Graterford (SCIG) serving a sentence of one to ten years imposed by the Court of Common Pleas of Philadelphia County. On March 26, 1976, defendant was notified that there was a detainer lodged from this district for the present indictment. On April 2, deputy U. S. marshals, pursuant to a writ of habeas corpus ad prosequendum, removed de-

fendant from SCIG and brought him into this court for arraignment. Defendant was then returned to SCIG without having been tried.

On April 19, defendant was again brought into this court for trial by writ of habeas corpus ad prosequendum. However, at the request of his newly appointed counsel, we granted a continuance for one week and defendant was again returned to SCIG. On April 26, when the continued trial was scheduled, defendant filed the present motion.

Defendant argues that a prisoner serving a state sentence can be brought to court to answer a federal charge only by the invocation of the Interstate Agreement on Detainers, 18 U.S.C. App.; 19 P.S. §§ 1431 *et seq.* ("Agreement"). That Agreement, defendant points out, provides two things, *inter alia*: (1) a mandatory period of thirty days within which the governor of the state of confinement may disapprove the request for temporary custody, Agreement, Article IV(a); and (2) unless trial is had on the indictment before the prisoner is returned to his original place of imprisonment, the indictment shall be dismissed with prejudice. Agreement, Article IV(e). Defendant's argument is pitched on the second of these provisions.

Preliminarily, we note that as used in the Agreement, the term "State" means, *inter alia*, the United States of America. Agreement, Article II(a). Thus, a transfer of a state inmate to the federal authorities, under the terms of the Agreement, is a transfer from one state to another.

In *United States ex rel. Esola v. Groomes*, 520 F.2d 830 (3d Cir. 1975), the relator was serving a federal sentence at Danbury, Connecticut. On April 21, 1971, he was transferred by writ of habeas corpus ad prosequendum to New Jersey to stand trial. On April 27, 1971, he was returned to Danbury without having been tried. Thereafter, by unspecified procedures, Esola was returned to Monmouth County on June 10, 1971, September 25, 1971, and January 6, 1972 for trial. During the January transfer he was tried and convicted. After exhausting state remedies attacking the validity of his conviction, Esola sought federal habeas corpus. The district court dismissed the petition. On appeal, New Jersey argued, as the government does here, that because the transfers were pursuant to writs of habeas corpus and not under the Agreement, the provisions of the Agreement were not relevant. In rejecting this argument, the court said, at page 837:

“* * * Were we to hold, as New Jersey urges, that the machinery of the Agreement is not the exclusive means of effecting a transfer for the purpose of prosecution on these allegations, then Article IV(c), requiring prosecution within 120 days of arrival, and Article IV(e), allowing for only one rendition, would be meaningless.

* * * * *

“Our holding that the Agreement provides the exclusive means of transfer when it is available was foreshadowed by and is fully consistent with the recent case of *Grant v. Hogan*, 505 F.2d 1220 (3d Cir. 1974).”

We see no room for doubt that at least in this circuit, the Agreement is the exclusive method for transfer of a state prisoner to another state (including, under the Agreement, the United States) for any phase of prosecution in the transferee state.¹ Of course, arraignment is an integral part of the prosecution, for without it there can be no trial.

The government also argues that the Agreement does not apply where the federal court seeking transfer is geographically located in the same state as the imprisoning state. The plain answer to this is that Congress could have so provided, but it did not. There is not a single word anywhere in the Agreement that would lend support to such contention. Nor did the Court of Appeals in *Esola* predicate its decision on any such distinction or give any hint that it might be important. For us to write such a term into the Agreement would be the plainest judicial legislation, and we refuse to do so.

Our conclusion in this respect is buttressed by the avowed purpose of the Agreement, as explicated in *Esola*, 520 F.2d at pages 836-837:

“* * * The purpose of the provision which this case brings into issue is to minimize the adverse impact of a foreign prosecution on rehabilitative programs of the confining jurisdiction. When a prisoner is needlessly shuttled between two juris-

¹ A contrary indication in *United States v. Ricketson*, 498 F.2d 367 (7th Cir. 1974), was rejected in *Esola*, *supra*. 520 F.2d at 838, n. 23.

dictions, then any meaningful participation in an ongoing treatment program is effectively foreclosed for two reasons. First, participation requires physical presence and the continuous physical presence of a prisoner is not possible when multiple trips to a foreign jurisdiction are made. Secondly, the psychological strain resulting from uncertainty about any future sentence decreases an inmate's desire to take advantage of institutional opportunities."

Admittedly, there may be minimal interruption of the rehabilitative process by a one-day trip from Graterford and return. However, Congress was not dealing with an individual situation, but rather with an agreement of national scope. Suppose the defendant had been imprisoned in Erie, and not Graterford. The interruption there would be far more serious than here. If the defendant were confined on a state charge in Amarillo, Texas and had to be transferred for an indictment pending in Brownsville, Texas, a distance of approximately 700 miles, the disruption there would be far from minimal and could seriously interfere with one of the purposes of the Agreement. Again, Congress could have written limitations into the Agreement. Again, it did not. And again, it is not for us to legislate. We can only conclude, as the court concluded in *Esola*, "that the Agreement provides the exclusive means of transfer when it is available * * *." 520 F.2d at page 837.

Having determined that the Agreement is the exclusive means of transfer, does it follow that Article

IV(e) requires dismissal of the indictment with prejudice? We think it does. That section provides:

"If trial is not had on any indictment, information or complaint contemplated hereby prior to the prisoner's being returned to the original place of imprisonment pursuant to article V(e) hereof, such indictment, information or complaint shall not be of any further force or effect, and the court shall enter an order dismissing the same with prejudice."

Defendant was brought to this district for arraignment on April 2. After arraignment he was returned to SCIG without having been tried. It matters not, as we see it, what the purpose of the transfer was. It is the fact of transfer, and not the reason that is important. In *United States v. Ricketson*, 498 F.2d 367 (7th Cir. 1974), the court said, at page 373:

"But there are no exceptions to the requirement that defendant not be returned to state custody untried."

In *Esola*, the court pointed out the adverse effect on the treatment program "[w]hen a prisoner is needlessly shuttled between two jurisdictions * * *." 520 F.2d at page 837. The court concluded that Article IV(e) allows "for only one rendition." *Ibid.*

Were we to exclude from the operation of Article IV(e) transfers for proceedings essential to the prosecutorial process, the entire fabric of Article IV(e) would be in tatters. It is ever important to remember that the Agreement, *vis-a-vis* the United States, is national in character. We cannot deal with it in the

context of Graterford to Philadelphia to Graterford. Rather, we must consider, *e.g.*, the background of Sacramento to Philadelphia to Sacramento. To adopt a view that the Agreement adheres *only* to bring a defendant in for the actual trial itself would make a mockery of the entire scheme. Under such a view, a California state prisoner could be brought to Philadelphia for arraignment, returned to California, brought back for a suppression hearing, returned to California, brought back again for handwriting exemplars, returned to California, and finally brought to Philadelphia a fourth time for trial, which may commence as late as 120 days from the final transcontinental trip. Article IV(c). A construction that would permit such needless shuttling would gut Article IV(e).

The Agreement appears to recognize that transfer may be needed for pretrial proceedings as well as for the trial itself. Article IV(c) permits the retention of temporary custody for as long as four months. There is no discernible reason why a prisoner should languish in the demanding jurisdiction for four months, unless it be to assure his presence for pretrial necessities. One rendition with a maximum duration of 120 days accomplishes this without unnecessary peregrinations. Clearly, unless this be the intent of the Agreement, the 120 days is totally unnecessary.

All of the foregoing considerations lead us to conclude that the Agreement contemplates one transfer for whatever is necessary to consummate the trial. If a defendant is transferred and returned without being

tried,² the indictment must be dismissed with prejudice.

² Since our conclusion is based upon defendant's return to SCIG following arraignment, we need not and do not consider the effect of his return after his counsel's request for a continuance was granted.

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF PENNSYLVANIA

Criminal No. 76-22

[Filed May 24, 1976]

UNITED STATES OF AMERICA

v.

LOUIS THOMPSON

OPINION FROM THE BENCH

LUONGO, J.

May 3, 1976

The defendant has moved to dismiss the indictment because he was brought before this court on a writ of habeas corpus for trial on a federal charge while he was serving a state sentence, the United States having failed to follow the procedures set forth in the Interstate Agreement on Detainers Act, 18 U.S.C. App. Art. I-IX (1970).

I am going to deny the motion. Certainly it is a very interesting question that is being raised here

and it is going to have to be resolved by the appellate courts at some point.

To apply the Act as you are suggesting, Mr. Block, would in my view run exactly contrary to the purpose of the Act. The purpose of the Act, as noted by Judge Van Dusen in the *Esola* case, *U.S. ex rel. Esola v. Grooms*, 520 F.2d 830 (3d Cir. 1975), is to minimize interruption of the rehabilitation procedure.

The *Esola* case, on its facts, is distinguishable in that *Esola* did involve a federal prosecution in New Jersey of a prisoner who had been brought from Connecticut on several occasions. In my view the Interstate Agreement on Detainers Act was intended to apply to interstate transportation of prisoners for purposes of trial.

In our case the federal government's jurisdiction and the state government's jurisdiction are geographically concurrent, at least within the confines of the state of Pennsylvania. There is no need to bring a prisoner from out of state. For this purpose I would limit the *Esola* holding to those cases in which the federal government is bringing in a state prisoner from beyond the geographical limits of the state in which the federal court is sitting. Whether or not that distinction was contemplated in the *Esola* case, I will limit *Esola* to that kind of a situation.

I point further to the legislative history of the Act in which, on page 4866 of the U.S. Code, Congressional and Administrative News, Part 3 of the 91st Congress, Second Session (1970), it was noted under the heading

"Need for the Legislation:

The Attorney General has advised the committee that a prisoner who has had a detainer lodged against him is seriously disadvantaged by such action. He is in custody and therefore in no position to seek witnesses or to preserve his defense. He must often be kept in close custody and is ineligible for desirable work assignments. What is more, when detainers are filed against a prisoner he sometimes loses interest in institutional opportunities because he must serve his sentence without knowing what additional sentences may lie before him, or when, if ever, he will be in a position to employ the education and skills he may be developing. Although a majority of detainers filed by States are withdrawn near the conclusion of the Federal sentence, the damage to the rehabilitation program has been done because the institution staff has not had sufficient time to develop a sound pre-release program."

Again, it goes on to give additional reasons for the adoption of this legislation.

Now I said a moment ago that if the procedures outlined in this Act were to be followed to the letter, even within the geographical limits of Pennsylvania, it would follow then that the United States, when it sought to prosecute a defendant already serving a state sentence in Pennsylvania, would be required to give thirty days notice. Then, after giving the thirty days notice, during which period either the governor or the defendant could raise questions about why the

prisoner should not be turned over, the United States would then be able to bring the prisoner in for the first time for arraignment. Thereafter the United States would be required to retain custody, physical custody of that prisoner throughout the period of time, which could be as much as 120 days, until the disposition of the charges. If there is anything more interruptive of a prisoner's rehabilitation program, I can't imagine it. It would mean that the United States would take him out of the state penitentiary, where they do have work and rehabilitation programs, and move him into a place like the Detention Center, where they have no such programs, or worse, if the City of Philadelphia refused any longer to play host to federal prisoners, it would mean that the United States might have to send him to the Federal Detention Center at New York to stay for the potential 120 days for the trial. This to me would be completely contrary to the purpose of the Act.

As we now operate, taking into account our obligations under the Speedy Trial Act, we have been arraigning defendants within 20 days of the indictment. Now we have reduced it to ten days in order to comply with the Speedy Trial Act. I don't know when Mr. Thompson was indicted. I have it before me here. The indictment was returned January 13 of 1976. Why has it been so long from indictment to this point?

MISS WETLESEN: I believe, your Honor, the defendant was not present at arraignment and a bench warrant was issued.

THE COURT: Yes, he failed to appear and bail was revoked. So we didn't learn of his whereabouts, I guess, until he was in state custody. But normally we are trying to move very, very promptly to trial. In this instance we brought him down here from Holmesburg and have been prepared to proceed in whatever time it will take to try this case and then he will return to Holmesburg to resume serving his sentence.

Now, I might ask, but only as a matter of curiosity, whether Mr. Thompson has any desire to postpone trial of this case. I may, perhaps, also as a matter of curiosity, ask Mr. Thompson if he would prefer serving his state sentence at the Detention Center where he would be a temporary visitor in federal custody. But those are only matters of preference, and I doubt seriously if his preference would really serve any purpose here.

One might raise a question in this case as to whether a state prisoner serving a sentence of less than two years in a county prison, as opposed to a longer term in a state penitentiary, is under any rehabilitative program. It is my understanding that state prisoners are in such programs if they are in a state penitentiary serving a sentence in excess of two years. However, this is not a matter of which I may take judicial notice, and I am not using that as a basis for my decision.

I am simply ruling in this case, even though there may be others who disagree, that the Interstate

Agreement on Detainers Act is not applicable in a case in which the federal government is trying a prisoner serving a state sentence within the geographical limits of the state in which the federal court is sitting.

The motion to dismiss the indictment is denied.

/s/ Alfred L. Luongo
J.